JAMALI ADNAN

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
[CRIMINAL APPEAL NO. 52 of 1984]
23 AUGUST 1985

CRIMINAL LAW AND PROCEDURE: *Criminal appeal - Common law principle of autrefois acquit and/or autrefois convict guaranteed under Article 7(2) - Meaning of "same offence" in Article 7(2), s. 59 of the Interpretation Act 1967 and s. 302(i) of the CPC - Whether plea of autrefois acquit or autrefois convict is governed by Article 7(2) and s. 302 of the CPC.*

The appellant was arrested on 19 October 1981. He led the police to two places where they recovered (a) 2 revolvers and (b) several rounds of ammunition. He was separately charged for robberies with a deadly weapon, i.e., a .38 revolver, with named co-accused or co-accuseds on 31 October 1981 and 1 November 1981 respectively. The appellant pleaded guilty to all 4 charges and was sentenced by the Sessions Court at Johor Bahru as follows:

(a) Criminal Trial No. A402/81	:	6 years' imprisonment and 3 strokes of the rotan
(b) Criminal Trial No. A407/81	:	6 year's imprisonment and 2 strokes of the rotan
(c) Criminal Trial No. A409/81	:	6 years' imprisonment
(d) Criminal Trail No. A410/81	:	6 years' imprisonment

The custodial sentences were ordered to run concurrently. The appellant did not appeal to the High Court against the sentences passed and in fact the sentences of whipping had been duly carried out.

While the appellant was still serving his prison sentence he was charged again on 14 March 1984 for offences under s. 57 of the Internal Security Act 1960 ("the ISA") for being in control, without lawful authority, of:

(i) One .38 Special revolver No. 32 and 4/1209 and one homemade .38 Special revolver under s. 57(i)(a) and

(ii) 29 rounds of .38 Special ammunitions and 10 rounds of .38 ammunitions under s. 57(1)(b).

The appellant was found guilty by the High Court and sentenced to death only on the first charge while sentence on the second charge was suspended pending the outcome of this appeal. A stay of execution was granted pending appeal to the Supreme Court after notice of appeal was filed by the appellant.

The question of law for the determination of the Court was whether the appellant could lawfully be charged again on 14 March 1984 in the High Court for offences constituted by the same acts under the ISA after he had been tried, convicted and sentenced by the Sessions Court at Johor Bahru for four robberies with a deadly weapon, i.e., a revolver, under ss. 392 and 397 of the Penal Code in 1981.

Held:

[1] The common law principle that "where a person has been convicted (or acquitted) of an offence by a Court of competent jurisdiction the conviction (or acquittal) is a bar to all further criminal proceedings for the same offence" is guaranteed by Article 7(2) of the Federal Constitution. However, whether or not a plea of *autrefois acquit* or *autrefois convict* can succeed is to be governed by Article 7(2) and s. 302 of the Criminal Procedure Code ("the CPC") whereas in England it appears to be still based on the common law.

[2] The phrase "same offence" in Article 7(2) of the Federal Constitution, s. 59 of the Interpretation Act 1967 and s. 302(i) of the CPC means "an offence whose ingredients are the same".

[3] In order to operate as a bar the appellant must prove that the second prosecution or trial must be either (a) for the same offence or (b) on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 166 or for which he might have been convicted under s. 167 of the CPC (see s. 302(i) of the CPC).

[4] In this case neither s. 166 nor s. 167 is applicable as there was no doubt at all as to the offences which the appellant had committed over a period of time with different accomplice or accomplices and on various victims. Further, the appellant has not been charged with the "same offence" in the Sessions Court and the High Court. A comparison of these charges would indicate that the essential ingredients are not the same as armed robbery could be regarded as an aggravated form of theft causing fear of instant death weapon. On the other hand, the essential ingredients under the ISA are simply control of firearms and/or ammunitions without lawful authority. Since Counsel for the appellant is unable to bring his case within the first limb of s. 302(i) of the CPC the main ground of appeal therefore fails.

[5] When the appellant was charged under s. 57 of the ISA the second time, he could only be tried in the High Court. Therefore, by virtue of s. 302(iv) of the CPC, the plea of *autrefois convict* would also fail.

[Appeal dismissed.]

Cases referred to:

R v. Miles [1890] 24 QBD 423
Connelly v. DPP [1964] AC 1254
R v. Kupferberg [1918] 13 Cr AR 166
State of Bombay v. S.L. Apte [1961] AIR SC 578
Manipur Administration v. Bira Singh [1965] AIR SC 87
Kharkan v. State of U.P [1965] AIR SC 83

Legislation referred to:

Criminal Appeal Act 1907 [UK], s. 4
Criminal Procedure Code, ss. 59, 166, 167, 302, 302(i), (iv), 303, 403
Federal Constitution, art. 7(2)
General Clauses Act 1897 [Ind], s. 26
Constitution of India [Ind], art. 20(2)

Interpretation Act 1967, s. 59
Internal Security Act 1960, s. 57, 57(1)(a), (b)
Penal Code, ss. 392, 397

For the appellant - R.K. Menon; (Abas Ismail & Hassan Ibrahim with him)
For the public prosecutor - Mohd. Noor Ahmad DPP; (Tan Hock Chuan with him)

JUDGMENT

George Seah SCJ:

Following his arrest on 19 October 1981 the appellant led the police to two places where they recovered (a) 2 revolvers and (b) several rounds of ammunitions. As a result of police investigations and cautioned statements made by the appellant, he was separately charged for robberies with a deadly weapon, to wit a .38 revolver with named co-accused or co-accuseds on 31 October 1981 and 1 November 1981 respectively. The appellant pleaded guilty to all these four charges and the following sentences were passed by the President of the Sessions Court at Johor Bahru, viz:

(a) As to Criminal Trial No. A402/81 : 6 years' imprisonment and 3 strokes of the rotan;

(b) As to Criminal Trial No. A407/81 : 6 years' imprisonment and 2 strokes of the rotan;

(c) As to Criminal Trial No. A409/81 and : 6 years' imprisonment

(d) As to Criminal Trial No. A410/81 : 6 years' imprisonment

It was ordered that all prison sentences are to run concurrently. The appellant did not appeal to the High Court against the sentences passed and we are informed by learned Counsel for the appellant that sentences on whipping had been duly carried out.

While the appellant was still serving his prison sentence he was charged again on 14 March 1984 for offences under s. 57 of the Internal Security Act 1960 for being in control, without lawful authority, of:

(i) 1 .38 special revolver No. 32 and 4/1209 **and** 1 homemade .38 Special revolver under s. 57(1)(a) and

(ii) 29 rounds of .38 special ammunitions and 10 rounds of .38 ammunitions under s. 57(1)(b) of the Internal Security Act 1960.

Since both these charges carry the death penalty learned Counsel was assigned to defend the appellant at the trial. The appellant was found guilty by the High Court and was sentenced to death only on the first charge while sentence on the second charge was suspended pending the outcome of this appeal. A stay of execution was granted pending appeal to the Supreme Court after notice of appeal was filed by the appellant.

Before the hearing of the appeal we allowed an application by the appellant to adduce additional evidence about the trials, convictions and sentences relating to the four armed robbery charges which took place in the Sessions Court in 1981 in order to enable the defence to raise the plea of "*autrefois convict*" after the learned Deputy Public Prosecutor had intimated to the Court that he had no objection to the motion. We also allowed the

memorandum of appeal to be amended so as to permit the appellant to include the plea of *autrefois convict* as a ground of appeal. Learned Counsel assigned to defend the appeal at the trial in the High Court stated that no instructions were given to him by the appellant about the trials, convictions and sentences in the Sessions Court at Johor Bahru in 1981; nor was he aware of these when he was defending the appellant in the High Court. However, these matters came to light only after a new defence Counsel had been assigned to argue the appeal of the appellant in the Supreme Court. As a matter of procedure, the plea of *autrefois convict* ought to be raised and determined before the commencement of the trial in the High Court (see s. 303 of the CPC) but having regard to the special circumstances of this case and in the interest of justice, we allowed the plea to be raised and argued in the Supreme Court.

The question of law we have to determine is whether the appellant could lawfully be charged again on 14 March 1984 in the High Court for offences constituted by the same acts under the Internal Security Act 1960 after he had been tried, convicted and sentenced by the Sessions Court at Johor Bahru for four robberies with a deadly weapon, to wit a revolver under ss. 392 and 397 of the Penal Code in 1981.

It is a principle of the common law of England and in particular in the administration of criminal justice that:

> where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence" (per Charles J in *R v. Miles* [1890] 24 QBD 423).

This fundamental right is now guaranteed by Article 7(2) of the Federal Constitution which enacts that:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a Court superior to that by which he was acquitted or convicted.

This fundamental right is further elaborated by Parliament in s. 59 of the Interpretation Act 1967 and s. 302 of the Criminal Procedure Code (FMS Cap. 6). Both s. 59 and s. 302 are substantially the same as s. 26 of the General Clauses Act 1897 and s. 403 of the Criminal Procedure Code 1898 of India. However, the corresponding article of the Indian Constitution dealing with the subject is Article 20(2) which reads:

> No person shall be prosecuted and punished for the same offence more than once.

Although the wordings may be different, in our opinion, the same principle that a person shall not be placed in "double jeopardy" and he punished twice for the same offence applies. This appears to be based on the latin maxim *Nemo debet bis vexari* - a man must not be put twice in peril for the same offence - and a plea of *autrefois acquit* or *autrefois convict* may be raised before the commencement of the second trial.

The foundation of the submission of learned Counsel for the appellant is the important decision of the House of Lords in the case of *Connelly v. DPP* [1964] AC 1254. In that case the appellant C and three other men were charged on 2 indictments with murder and robbery with aggravation, arising out of an office robbery in November 1962 during which an employee was killed. In accordance with practice at the time, the indictment for murder was tried alone, C defence being (a) alibi and (b) if present, no intent to murder. The jury returned a general verdict of guilty against all four men. At the conclusion of the trial the Judge directed that the indictment for robbery should remain on the file marked "Not to be proceeded with without

leave of this Court or of the Court of Criminal Appeal". C appealed on some 15 grounds but the sole issue considered by the Court of Criminal Appeal was whether the evidence and the direction to the jury on the question whether or not C had been present at the scene of the crime were satisfactory. The Court considered that on that issue the jury had been so misdirected that the conviction must be quashed and directed a verdict of acquittal to be entered, as required by s. 4 of the Criminal Appeal Act 1907; but the Court thereafter granted leave to the Crown to proceed with the prosecution of C on the second indictment for robbery. The plea of *autrefois acquit* was raised and rejected and C was duly tried and convicted on the robbery indictment. On appeal to the Court of Criminal Appeal it was dismissed and on further appeal to the House of Lords it was held that the plea of *autrefois acquit* must be given a limited scope and that it was not a bar to C being tried afresh on the robbery charge.

After a full review of the authorities Lord Morris of Borth-y-Gest appears to lay down the following propositions:

(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

(4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

(5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assault person later dies;

(6) that on a plea of *autrefois acquit* or *autrefois convict* a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the Court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(8) that, apart from circumstances under which there may be a plea of *autrefois acquit*, a man may be able to show that a matter has been decided by a Court competent to decide it, so that the principle of *res judicata* applies;

(9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime.

Neither learned Counsel for the appellant nor the learned Deputy Public Prosecutor is able to find any decision of the Indian Supreme Court after 1964 adopting any of the propositions formulated by Lord Morris or following *Connelly* case (*supra*). This is not surprising because in our judgment, whether or not a plea of *autrefois acquit* or *autrefois convict* can succeed is to be governed by Article 7(2) of the Federal Constitution and the provisions of s. 302 of the Malaysian CPC whereas in England it appears to be still based on the common law. For the purpose of this appeal we have to turn to Article 7(2) of the Federal Constitution and s. 302 of the Malaysian CPC to find an answer to the solution of the appellant's submission.

The phrase "same offence" is used in Article 7(2) of the Federal Constitution, in s. 59 of the Interpretation Act 1967 and in s. 302(i) of the CPC. In *R. v. Kupferberg* [1918] 13 Cr AR 166 @ p. 168, A.T. Lawrence J said that:

> the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients...

This case was cited by Lord Morris in the *Connelly* case *(supra)* at p. 1324. In the Indian Supreme Court the expression "same offence" has been interpreted to mean "an offence whose ingredients are the same" (see *State of Bombay v. S.L. Apte* [1961] AIR SC 578 and *Manipur Administration v. Bira Singh* [1965] AIR SC 87). We agree and accept this construction by the Indian Supreme Court and would adopt it in construing the phrase "same offence" in the administration of criminal justice in his country.

In order to operate as a bar the appellant must prove that the second prosecution or trial must be either (a) for the same offence or (b) on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 166 or for which he might have been convicted under s. 167 of the CPC [see s. 302(i) of the CPC]. Now, ss. 166 and 167 read;

> 166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offence.
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> 167. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

In our opinion, s. 166 provides for a situation where it is doubtful what offence has been committed. When a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, that section permits that the accused may be charged with having committed all or any of such offences and any number of such charges in the alternative with having committed some one of such offences. Section 167, on the other hand, enables the trial Court to convict an accused charged with one offence for a different offence where the facts show that a different offence has been committed [see *Kharkan v. State of U.P.* [1965] AIR SC 83 @ p. 86].

In our judgment, neither of these provisions is applicable to the facts of this case because here, there was no doubt at all as to the offences which the appellant had committed over a period of time with different accomplice or accomplices and on various victims. In fact, the appellant had no hesitation in pleading guilty to all the four charges of robberies with a deadly weapon when he appeared before the Sessions Court at Johor Bahru.

Nor did the first limb of s. 302(i) of the CPC, in our opinion, apply inasmuch as the appellant has not been charged with the "same offence" in the Sessions Court and the High Court. In the Sessions Court the appellant was charged with robberies with a deadly weapon, to wit a revolver under s. 392 and punishable under s. 397 of the Penal Code. Whereas in the High Court the charges were under the Internal Security Act 1960. A comparison of these charges would indicate that the essential ingredients are not the same as armed robbery can be regarded as an aggravated form of theft causing fear of instant death or hurt on the intended victim voluntarily by means of a deadly weapon. On the other hand, the essential ingredients under the Internal Security Act 1960 are simply control of firearms and/or ammunitions without lawful authority. Since learned Counsel for the appellant is unable to bring his case within the first limb of s. 302(i) of the CPC the main ground of appeal therefore fails.

It cannot be disputed that charges under ss. 392 and 397 of the Penal Code are triable in the Sessions Court and that the Court is not competent to hear charges under s. 57 of the Internal Security Act 1960 which carries the mandatory death penalty. Only the High Court can pass such a sentence in law. It follows that when the appellant was charged under s. 57 of the Internal Security Act 1960 the second time he can only be tried in the High Court. It seems that the plea of *autrefois convict* would also fail by reason of s. 302(iv) of the CPC. But it is pertinent to note that this sub-paragraph confers a discretion on the Public Prosecutor to charge the appellant on any other offence or offences constituted by the same acts which he might have committed, and we have not heard any submission by learned Counsel for the appellant that this discretionary power had been wrongly or improperly exercised. In fact, no ground of appeal had been raised challenging the exercise of this discretion by the Public Prosecutor. Now, sub-paragraph (iv) of s. 302 of the CPC reads:

> A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he was subsequently charged.

Having disposed of the plea of *autrefois convict* which, in our judgment, did not apply to the facts of this case, we turn to deal with the other grounds based on the merits of the appeal.

Also found at [1985] 2 CLJ 415